

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DARLENE TETER

Claimant

VS.

DILLARD DEPARTMENT STORES, INC.

Respondent

Self-Insured

)
)
)
)
)
)
)

Docket No. 175,541

ORDER

The respondent requests review of the Award entered by Administrative Law Judge George R. Robertson dated June 21, 1994.

APPEARANCES

Claimant appeared by her attorney, Randy S. Stalcup of Wichita, Kansas. The respondent appeared by its attorney, Brian J. Fowler of Kansas City, Missouri.

RECORD & STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits based upon a 40 percent work disability. The respondent requested this review and asks the Appeals Board to review the issues of average weekly wage and the nature and extent of disability. Those are the only two issues on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds:

For the reasons expressed below, the Award of the Administrative Law Judge should be modified.

The parties stipulated that claimant sustained personal injury by accident arising out of and in the course of her employment with the respondent on January 13, 1993. At the time of the accident, claimant was 60 years old and had worked for the respondent since April 1988 as a sales associate.

Claimant injured her back in this accident and underwent surgery one month later. Wichita neurosurgeon John Hered, M.D., performed a laminectomy and discectomy at the fourth and fifth intervertebral levels of the lumbar spine. After Dr. Hered released her in June 1993, claimant has had no additional treatment for this injury. After recuperating from her surgery, claimant did not return to work for the respondent and has since qualified for social security on her husband's account, although she had hoped to wait until she was at least 62 or 65 years old to begin to receive those benefits. In compliance with company policy, after her being off work six months on leave of absence, respondent terminated claimant from its employ.

(1) The Appeals Board finds claimant's average weekly wage to be \$479.26. Both parties stipulated that claimant's average weekly wage without additional compensation items was \$449.26. In its brief to the Appeals Board, the respondent agrees that \$30.00 is a reasonable sum for the weekly value of the additional compensation items claimant received and agrees that it may be used to compute the average weekly wage. In her brief, claimant concedes the record is silent regarding the weekly value of the additional compensation items.

(2) Claimant presented the testimony of Daniel D. Zimmerman, M.D., a physician board eligible in internal medicine. One of the doctor's positions is District Medical Director for the Department of Labor. A significant portion of that job consists of reviewing other physician's reports and ratings prepared according to the AMA Guides. At her attorney's request, Dr. Zimmerman examined claimant in June 1993. The doctor found that claimant presently has pain and discomfort affecting her lumbar paraspinal musculature with radicular symptoms affecting her right lower extremity. He believes claimant has sustained a 22 percent whole body functional impairment and that claimant should be restricted from lifting no more than 20 pounds on an occasional basis and 10 pounds on a frequent basis; avoid frequent flexing or extending the lumbosacral spine; and avoid frequent stooping, squatting, crawling, and bending. He does not believe claimant could return to work as a sales clerk because of the protracted periods she would be required to stand and walk. Also, he believes claimant would have difficulty doing moderate bending and light lifting eight hours per day, five days per week.

Respondent presented the testimony of board-certified orthopedic surgeon Robert L. Eyster, M.D., who examined claimant for the respondent in June 1993. He believes claimant sustained a 7 percent whole body functional impairment due to her injuries and that she should be restricted from lifting more than 45 pounds in a single lift or greater than 30 pounds more than 10 times an hour. He also believes that she should be restricted from repetitive bending or twisting more than 10 to 15 times an hour. He testified that his functional impairment rating was based on the AMA Guides. He believes that claimant could perform her former job as described by the respondent. However, in the doctor's report dated June 2, 1993, attached as an exhibit to his deposition, Dr. Eyster indicates claimant should not bend over to adjust hems on dresses. Neither counsel asked the doctor if that statement contradicted his testimony that claimant could perform her former job.

Because hers is an "unscheduled" injury, claimant's right to permanent partial disability benefits is governed by K.S.A. 1992 Supp. 44-510e. That statute provides:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Claimant presented the testimony of human resources consultant Jerry D. Hardin. He was hired by claimant to evaluate both her loss of ability to perform work in the open labor market and loss of ability to earn a comparable wage as a result of her back injury. Using a pre-injury labor market of occupations in the sedentary, light and medium physical labor categories, he believes claimant has lost 60 to 65 percent of her ability to perform work in the open labor market, utilizing the restrictions of Dr. Zimmerman, and 15 percent utilizing the restrictions of Dr. Eyster. He also believes claimant retains the ability to earn \$240.00 per week considering Dr. Zimmerman's restrictions. Considering Dr. Eyster's restrictions, Mr. Hardin believes claimant has not lost any ability to earn comparable wages.

Respondent presented the testimony of vocational rehabilitation counselor Karen Crist Terrill whom it hired to evaluate claimant. Ms. Terrill believes claimant has sustained a 47 percent loss of her ability to perform work in the open labor market using Dr. Zimmerman's restrictions and a 10 percent loss using Dr. Eyster's. She believes claimant did not lose any ability to earn a comparable wage because claimant has transferable sales and management skills.

Based upon the above evidence, the Administrative Law Judge found that claimant was entitled to a 40 percent permanent partial general disability. The Judge gave no explanation how he arrived at that decision other than stating that he had considered both loss of ability to perform work in the open labor market and the loss of ability to earn a comparable wage.

Based upon the entire record, the Appeals Board finds that claimant has sustained a 34 percent loss of ability to perform work in the open labor market. The Appeals Board finds that claimant's work restrictions and limitations fall somewhere between those set forth by Drs. Zimmerman and Eyster. Therefore, the opinions of Mr. Hardin and Ms. Terrill should be averaged to determine claimant's loss of ability to perform work in the open labor market, which yields a 34 percent loss.

The Appeals Board also finds that claimant has sustained a 13 percent loss of ability to earn a comparable wage. This conclusion is also based upon giving equal weight to the opinions of both Mr. Hardin and Ms. Terrill regarding claimant's present wage-earning ability and factoring in the correct average weekly wage.

Although the Appeals Board is not required to equally weigh the loss of ability to perform work in the open labor market with the loss of ability to earn a comparable wage, there is no compelling reason to give either loss greater weight than the other under this fact situation and, accordingly, they will be weighed equally. The result is an average between the 34 percent loss of ability to perform work in the open labor market and the 13 percent loss of ability to earn a comparable wage, resulting in a 24 percent work disability which the Appeals Board considers to be an appropriate basis for the award in this case.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge George R. Robertson dated June 21, 1994, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Darlene Teter, and against the respondent, Dillard Department Stores Inc., a self-insured, for an accidental injury which occurred on January 13, 1993 and based upon an average weekly wage of \$479.26, for 25 weeks of temporary total disability compensation at the rate of \$299.00 per week or \$7,475.00, followed by 390 weeks of permanent partial disability benefits at the rate of \$76.68 per week or \$29,905.20 for a 24% permanent partial general disability, making a total award of \$37,380.20.

As of March 29, 1996, there is due and owing claimant 25 weeks of temporary total disability compensation at the rate of \$299.00 per week or \$7,475.00, followed by 142.29 weeks of permanent partial disability compensation at the rate of \$76.68 per week in the sum of \$10,910.80, for a total of \$18,385.80 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$18,994.40 is to be paid for 247.71 weeks at the rate of \$76.68 per week, until fully paid or further order of the Director.

The remaining orders set forth in the Award are hereby adopted by the Appeals Board to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of March 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Brian J. Fowler, Kansas City, Missouri

DARLENE TETER

5

DOCKET NO. 175,541

Randy S. Stalcup, Wichita, Kansas
Philip S. Harness, Director